STATE OF MICHIGAN

COURT OF APPEALS

JAY PATTERSON,

Plaintiff-Appellant,

v

ROSCOMMON COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
June 28, 2005

No. 253662
Roscommon Circuit Court
LC No. 02-723648-CL

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. We reverse and remand.

The case arose when plaintiff, who had worked as a truck driver for defendant for a number of years, applied for an engineering technician position. He and several other applicants were invited to interview with defendant's Board of Road Commissioners. A different applicant was offered the position, but, when he declined, the board decided to readvertise the position rather than hire one of the other applicants. Plaintiff's union representative testified that he asked Gloria Burns, defendant's manager and chief financial officer, why plaintiff and another applicant were not offered the position, and he was told that "their age was one thing." The position was ultimately given to a younger person.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. However, only substantively admissible evidence should be considered in opposition to the motion, and that evidence must amount to more than a "mere promise" or a "mere possibility that the claim might be supported by evidence produced at trial." *Id*. at 121.

Our Supreme Court has explained that if a "plaintiff is able to produce direct evidence of" bias, he or she "can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628

NW2d 515 (2001). In context, "direct evidence" means "'evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Id*., quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F 3d 921, 926 (CA 6, 1999). A single remark from a supervisor in the context of a discussion regarding a plaintiff's termination, even if the statement might be subject to multiple interpretations, is sufficient to constitute direct evidence, and the remark's weight and believability are strictly matters for the finder of fact. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 538-541; 620 NW2d 836 (2001).

However, where the remark is "not made by a person involved in the termination of plaintiff's employment," it is irrelevant and "cannot be attributed to the employer." *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 301-302; 624 NW2d 212 (2001). Furthermore, "[t]he risk of admitting evidence of a biased opinion made by an employee who is unrelated to the decision making process is that, even if the remark is isolated, ambiguous, or remote in time, it unfairly suggests to the jury that the remark and its underlying motivation have the imprimatur of the employer," so such a remark is inadmissible under MRE 403. *Id*. at 303-304. Thus, whether a stray remark suggesting a discriminatory reason for an employment decision may be admitted depends on whether the speaker was involved in that decision.

Here, the remark that "age was one thing" in the context of an inquiry into why plaintiff was not hired, if believed, mandates the conclusion that age "was at least a motivating factor in" defendant's decision not to hire plaintiff. *Hazle*, *supra* at 462. Furthermore, although the Board of Road Commissioners, not Burns, was the actual decisionmaker, Burns was present at, and indeed took down the minutes for, every relevant meeting of the board. She was also responsible for at least some sorting of the applicants.[1] Her role was certainly not inconsequential. She attended board meetings, helped the board make policy decisions, reviewed and selected résumés of job applicants, and, significantly, dealt with "personnel problems." The scope of her employment included input into the processes leading up to the decision, as well as dissemination of the board's decisions on the matter to the public and to its other employees. Thus, the remark was not "made by an employee who is unrelated to the decision making process," so it is not irrelevant and it is not substantially more prejudicial than probative. *Krohn*, *supra* at 301-304. Therefore, it constitutes admissible direct evidence of bias, and its weight and credibility are for the trier of fact to decide. *DeBrow*, *supra* at 538-541. However, the trial court granted summary disposition because it did not believe the remark was worthy of belief. Because direct evidence of bias cannot be weighed by the trial court, summary disposition was inappropriate. *DeBrow*, *supra* at 540.

Plaintiff argues that the trial court inappropriately relied on purported legal dictates of the Open Meetings Act (OMA) as part of its basis for this conclusion. We find nothing in the record to support this. Rather, the trial court contrasted "a statement that may or may not have been made by somebody who is not in the hiring loop, who is in ad [sic] ministerial position" with "a public body operating under public scrutiny under the open meetings act" whose "decisions are

[1] Indeed, she testified at deposition that the decision of who to interview was made by "Dave Carrick, our superintendent, and I."

all on the record." Although, as discussed, this constitutes inappropriate weighing of the evidence, it does not constitute a legal conclusion based on an erroneous interpretation of the OMA.

Although the trial court did not address the issue, we briefly address plaintiff's argument that Gloria Burns's statement is not hearsay. We may do so because the issue was raised in the trial court and is pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We agree that it is not hearsay.

An out-of-court statement made by a party may be admitted into evidence as nonhearsay "when it is the party's own statement, in either an individual or a representative capacity." MRE 801(d)(2); *Merrow v Bofferding*, 458 Mich 617, 633; 581 NW2d 696 (1998). MRE 801(d)(2)(D) provides that the statement may be made "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." See also *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 440; 653 NW2d 415 (2002). Burns's statement was made while she was defendant's employee. As noted, her duties included attending board meetings, helping the board make policy decisions, reviewing and selecting résumés of job applicants, and, significantly, dealing with "personnel problems." The scope of her employment included input into the processes leading up to the decision, as well as dissemination of the board's dictates on the matter to the public and to its other employees. Therefore, a statement to an applicant explaining why he was not hired was within the scope of her employment. Burns' alleged statement thus satisfied the requirements of MRE 801(d)(2)(D).

The "prima facie case" standard involving indirect evidence is "not applicable if a plaintiff can cite direct evidence of unlawful discrimination." *DeBrow*, *supra* at 539. Because we find that plaintiff has cited direct evidence of unlawful discrimination, we do not address the parties' arguments regarding the "prima facie case" standard.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff